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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 859

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CONCERNING PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument	6

Table of Citations

Hearings on the Administration of Public Law 88-108 before the Senate Committee on Commerce, 89th Cong., 1st Sess.	2, 3, 4, 5
Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess.	9, 10
Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess.	9, 10
Rule 23 of the Supreme Court	1
Bangor and Aroostook R. Co. v. *Brotherhood of Loc. F. & E.*, 258 F. Supp. 346 (D.D.C., 1966)	6

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Opinions Below

The opinion of the District Court is reported at 253 F. Supp. 682. That opinion has not been appended to the petition, as required by Rule 23(1)(a) and (i) of this Court, but is included as Appendix A to the petition for writ of certiorari filed by respondents herein as No. 933. The opinions of the Court of Appeals (App. A of Petition), not yet officially reported, are unofficially reported at 55 CCH Labor Cases ¶11,912 and 56 CCH Labor Cases ¶12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force," do the modifications in prior agreements and rules governing the employment of firemen which were made by or pursuant to the Award continue to apply until changed in accordance with the Railway Labor Act, or do the prior agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

Statement of the Case

Respondents herein are the petitioners in No. 933, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate description of the relevant facts and occurrences than is contained in the instant petition.

Insofar as the Statement of the Case in the instant petition is comprised of a discussion of the legislative history of P.L. 88-108 and other legal arguments, we deal briefly with such matters in the Argument section of this brief. Petitioner makes certain factual or quasi-factual statements which are not dealt with in No. 933, however, and which we believe to be erroneous.

Petitioner (Pet., at 12) quotes certain testimony by the Chairman of Arbitration Board No. 282, Mr. Ralph Seward, in the Hearings on the Administration of Public Law 88-108 before the Senate Committee on Commerce, 89th Cong., 1st Sess., and implies that Mr. Seward agreed with petitioner's view that the prior agreements and rules would be automatically restored upon expiration of the Award. Peti-

tioner neglected to mention that both Mr. Seward and another of the Neutral Members of Board 282 (Mr. Benjamin Aaron) made entirely clear that neither they nor the Board were expressing any views on that legal issue, as follows (Hearings, *supra* at 389-390):

> "The Chairman [of the Committee]. What I am trying to get at is when this ends and the board's award expires, what will be our situation, then, and whether or not this committee, or yours, or all of us here, the brotherhoods and the carriers, ought to, between now and that particular time, sitting down or thinking about it, or trying to work some of these problems out.
>
> "Mr. Seward. As a private citizen, sir, I would urge that such things be done.
>
> • • • • •
>
> "The Chairman. Could the award board, your board, reconvene before that time to take up some of these problems?
>
> "Mr. Seward. We have authority, sir, only to reconvene as we are. We are meeting 2 weeks from now to interpret questions submitted to us in writing. We have no authority to consider the effect after the award as a legal board.
>
> "The Chairman. But your interpretation of the disputes could be—and I could see where it might be, in many cases—helpful in arriving at some conclusions before you go out of business.
>
> "Mr. Aaron. Senator, I don't think there would be any agreement among the members of the board that the board had any authority even to make a recommendation in respect to that particular issue.
>
> "We have speculated about it from time to time, all of us wondering what the legal effect would be when the

date of the expiration of the award takes place, whenever that date may be, which is also uncertain, but I think it safe to say that the parties believe that is a matter that should be left to them to determine, or certainly, that it should not be for this board to determine, or even to attempt to interpret for the parties.

"The Chairman. You have answered my question. I was hopeful that you might suggest that without authority, you might be helpful.

* * * * *

"The Chairman. Specifically, after the expiration of the award, whatever the date may be, what will be the status of the dispute between the railroads and the brotherhoods involving the firemen, first?

"Mr. Seward. I wish I could answer that question, sir.

"The Chairman. It will be open?

"Mr. Seward. Certainly."

Indeed, Board 282 has formally ruled that the issue as to the rules in effect following the expiration of the Award, which involves an interpretation of P.L. 88-108 and the Railway Labor Act rather than of the Award, is not within its jurisdiction to decide. See the petition in No. 933, fn. 13, at 31.

Petitioner states (Pet., at 12-13) that, during the period of the Award, respondents "effected the severance from employment of some 18,000 men" which "was three times as great a reduction as the Arbitration Board itself had expected . . . ." That statement is erroneous. As the parties stipulated (JA 132), respondents "reduced the number of firemen (helpers) in their employ by about 18,000 . . . ." But most of that reduction in the number of firemen employed by respondents resulted from their promotion to

better jobs as locomotive engineers or from natural attrition, rather than from their severance from employment pursuant to the Award. Of the 17,250 firemen's positions that were eliminated during the first 14 months of the Award, only 3,160 represented the severance of firemen who were not entitled to offers of comparable jobs; 4,465 firemen were separated from employment after refusing offers of comparable jobs, and the remainder either accepted offers of comparable jobs, were promoted to engineer positions, or ceased their employment by reasons of natural attrition. Hearings, *supra* at 510. In fact, therefore, the number of firemen separated from employment pursuant to the Award did not greatly exceed the lowest estimates, and it seems safe to say that any excess in that regard largely resulted from the fact that almost all of the firemen entitled to offers of comparable jobs (with five-year guarantees against any reduction in pay) elected, instead, to accept the generous separation allowances provided by the Award. Moreover, as the Chairman of Board 282 testified, "we were not thinking in terms of the number of jobs that would be eliminated. We were trying to think of the fairest system for procedures for elimination of jobs, giving protection to different kinds of employees, according to their attachment to industry, length of time they had served or so forth, and endeavoring to work out a fair set of procedures and rules which we thought would be effective and fair." Hearings, *supra* at 364. Mr. Seward testified further that it remained his "judgment today . . . that the 10-percent margin [jobs which the union could veto] was adequate to protect the undue burdening of other workers, the maintenance of safety and the protection in jobholding of those who are entitled to it . . . ." Hearings, *supra* at 362.

Petitioner (Pet., at 14) quotes the opinion of the Court of Appeals for the statement that "Notice No. 1," which

was served by petitioner under Section 6 of the Railway Labor Act prior to the expiration of the Award, "would have pegged employment at a level of 6,000 jobs below the terms of the National Diesel Agreement." There is no support in the record for that statement, none was cited by the Court of Appeals (Pet., at 25a), and respondents understand Notice No. 1 (JA 144-147) to propose a rule requiring the use of firemen on virtually all locomotives.

Finally, petitioner asserts (Pet., at 16) that the trial judge, in rulings subsequent to his judgment of May 12, 1966 (JA 231-237), "diluted even further his 'affirmative acts' proscription." In fact, the trial judge merely interpreted his judgment to mean what it plainly said (in factual contexts considerably more complicated than petitioner indicates) whereby respondents were authorized to continue to apply their rules for the employment of firemen as modified by Award 282, until such rules were changed in accordance with the Railway Labor Act. See *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 258 F. Supp. 346 (D.D.C., 1966), appeals by BLF&E pending, Nos. 20472, 20473, 20647 (D.C. Cir.).

Argument

As we have noted, the respondents to the instant petition are the petitioners in No. 933, and both petitions seek review of the same judgment below. While the parties complain about different aspects of that judgment, many of the considerations involved are the same with respect to both petitions. The fundamental premise of the carriers' position is that the Congress intended the Railway Labor Act to govern the situation following the expiration of Award 282. In No. 933 we show that the Court of Appeals (as well as the District Court) agreed with that premise, but fell into error in certain of its interpretations of the Railway Labor

Act. In this petition, the union attacks that fundamental premise and contends that the Congress intended, regardless of the Railway Labor Act, that the National Diesel Agreement and other prior agreements and rules governing the employment of firemen were to be automatically restored to full effect upon the expiration of the Award.

We believe that the union's position in this regard is without foundation in P.L. 88-108, in its legislative history, in the Railway Labor Act and in reason, as well as having been rejected by both courts below. We recognize, however, that the Court probably will not attempt to determine who is right and who is wrong upon the basis of the petitions and responses thereto, as such matters normally are determined only after full briefing and argument. Since we are convinced that the petition in No. 933 presents important issues which should be reviewed by this Court, and in view of the considerations stated above, we do not oppose the grant of this petition if the petition in No. 933 also is granted.

We emphasize, however, our view that there is no support for petitioner's contention that the National Diesel Agreement and other prior agreements and rules governing the employment of firemen were intended to be restored automatically upon expiration of the Award. Petitioner relies upon the fact that the Award, under its own terms and as required by P.L. 88-108, expired after two years. But that fact merely poses the issue as to what rules are to govern the employment of firemen after the expiration of the Award; it does not provide the answer to that issue. This is also true, of course, with respect to the references in the legislative history to the fact that the Award was to expire after two years or to the "interim" or "temporary" nature of the proposed legislation.

Indeed, most of the legislative history relied upon by petitioner (Pet., at 5-15) relates to the Administration's bill

rather than to P.L. 88-108 as eventually enacted.[1] But despite relying upon that legislative history, petitioner carefully refrained from noting that both the language of the Administration's bill and the full committee testimony with respect thereto left no doubt about the situation which would follow expiration of the I.C.C. regulations proposed therein. That situation would *not* have been restoration of the National Diesel Agreement and other prior agreements and rules governing the employment of firemen. Rather, in the absence of an agreement or further legislation, the 1959 and 1960 Section 6 notices would have remained outstanding and both parties would have been free to resort to self help with respect thereto—the carriers could implement their proposal giving them full discretion over the employment of firemen and the union could strike.[2]

Pertinent provisions in the Administration's bill are quoted in the petition in No. 933, at 16-17, and supporting testimony by Secretary of Labor Wirtz in the hearings is there cited. Without attempting to set that testimony out in full, we think it sufficient at this stage to quote two examples:

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[1] This is true of the President's message, the statement by Senator Morse and all of the committee hearings. Of the legislative history quoted in the petition, the only exceptions are the statements in the committee reports (Pet., at 6-7) merely noting the fact that the Award was to expire after two years, and the statement by Congressman Harris in the floor debates (Pet., at 7-8). The statement by Congressman Harris supports respondents because he there made plain that, after the two-year period, "it goes back to the usual collective bargaining processes." In the railroad industry, the "usual collective bargaining processes" are those provided by the Railway Labor Act. See the petition in No. 933, at 19.

[2] In addition, the parties would have been expressly required to continue bargaining upon the 1959 and 1960 Section 6 notices. The legislative history cited by petitioner (Pet., at 13-14) to the effect that such bargaining should and would occur was directed to that requirement in the Administration's bill. See the petition in No. 933, at 16-17, 39-40.

"Senator McGee. What happens, again for the record, to an interim rule that expires without any negotiated rule having been made during the 2-year life?

"Secretary Wirtz. And no renewal of the resolution?

"Senator McGee. Yes.

"Secretary Wirtz. It would mean that section 6 notices now in effect would still be standing and that there would be a right of either party to take whatever course of action it wanted at that time." Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess., at 81.

"Mr. Devine. I think I know the answers to this, but I think it should be made clear in the record. Say all of the gymnastics provided in this bill are gone through and the procedures are followed and the Interstate Commerce Commission makes recommendations, and let us say the brotherhoods in this instance would not agree to go along with the recommendations. Would they then be free to strike?

"Secretary Wirtz. After the interim rule had been in effect for the 2-year period, then assuming there is no agreement, the situation would be that they would be at that point unless there was further action taken by the Congress." Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., at 107.

Secretary Wirtz also agreed that there was "a strong likelihood the President would recommend an extension" of the legislation if the dispute was not settled during the two-year period of I.C.C. regulation, and stated that consideration would be given to calling "a special session of the Congress" if the Congress was not in regular session

at the time. Hearings on S.J. Res. 102, *supra* at 55-56, 61. Thus, petitioner's president, Mr. H. E. Gilbert, testified that "I further have a strong feeling that at the expiration of . . . 2 years or 10 years, the same medium to oppose us from our exercise of our self help would be imposed upon us." Hearings on H.J. Res. 565, *supra* at 822.

The only interpretation of the Administration's bill contrary to that of Secretary Wirtz was given by counsel for one of the other unions, who thought that the I.C.C. rules would remain in effect after the two-year period but would then be subject to change under the Railway Labor Act. Hearings on H.J. Res. 565, *supra* at 682. No one suggested that the National Diesel Agreement and other prior agreements and rules would have to be restored, as petitioner now contends, either under the Administration's bill or under P.L. 88-108 as eventually enacted.

In the petition filed as No. 933 (pp. 16-27, 36-40), we have demonstrated that the Congress rejected the Administration's bill and adopted the arbitration provisions of the Railway Labor Act so as to bring about a "complete and final disposition" of the 1959 and 1960 Section 6 notices. In so doing, the Congress intended that the expiration of Award 282 should have the same effect as the expiration of any other collective bargaining agreement or arbitration award under that Act. Under that Act, the rights and duties of the parties to such an agreement or award are not changed by the expiration of the agreement or award, but continue until changed pursuant to new Section 6 notices in accordance with the Act. The purpose and effect of an expiration date in the agreement or award is to permit the parties thereafter to proceed under the Act with bargaining upon new Section 6 notices proposing changes, rather than to restore the situation in effect prior to such agreement or award. Since the parties to the two petitions are identical,

we see no need to repeat herein the support for these propositions which we have set forth in No. 933.

Respectfully submitted,

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